THE PUBLIC INTEREST LITIGATION CLINIC
MISSOURI CAPITAL CASE UPDATE
March – August 2010

NOTEWORTHY NEWS

SAME FIRM, NEW NAME

On October 1, the Public Interest Litigation Clinic will change its name to the Death Penalty Litigation Clinic. Our new website will be up and running at that time and will include a databank of all death penalty cases within the Eighth Circuit, as well as resources for capital defense teams. Please visit us at www.dplclinic.com.

CLEMONS GETS DNA TESTING

Reginald Clemons' bid to prove his innocence received some good news following the Missouri Supreme Court's appointment of Jackson County Circuit Judge Michael Manners as special master. Judge Manners ordered DNA testing of previously undiscovered materials. Those familiar with the case will know that a bevy of questionable decisions were made by the St. Louis Police Department and the prosecuting attorneys. Judge Manners ordered the testing of DNA evidence obtained from the body of one of the women Mr. Clemons was convicted of killing. The DNA evidence comes from a rape kit located by assistant prosecuting attorney Nels Moss, as described in his testimony to the Missouri Attorney General's office. Moss never turned over the evidence, and said it had be in the St. Louis Police Department's Crime Lab all these years. Additionally, Moss said on The Charles Jaco Show that he also used to have the clothing of one of the deceased girls. Moss said he would have turned it over to the defense if they had asked – which is at odds with the fact that the defense did request and never received the clothing. Moss denied this, though, in his deposition with the Missouri Attorney General.

Special thanks to Chris King from the *St. Louis American* for his continued coverage of this story.

MISSOURI SETS EXECUTION DATE AGAINST RODERICK NUNLEY

On August 19, the Missouri Supreme Court set an execution date of October 20 against Roderick Nunley.

EQUITABLE TOLLINGS EXISTS!

The Supreme Court ruled in *Holland v. Florida*, 130 S. Ct. 2549 (2010), that the AEDPA's one-year statute of limitation is subject to equitable tolling. Under *Holland*, equitable tolling may even be available when a petition's untimeliness is caused by habeas counsel's errors, at least when counsel's conduct is "egregious." The ruling is discussed in greater detail below.

PROPORTIONALITY REVIEW UPDATE

In a trio of decisions over the last several months, a bare 4-3 majority of the Missouri Supreme Court has formally held that proportionality review must include a comparison of the case at hand to "similar" capital cases in which the defendant was sentenced to life. *See State v. Anderson*, 306 S.W.3d 529 (Mo. 2010) (opinions of Breckenridge, J., and Wolff, J.); *State v. Davis*, — S.W.3d —, No. SC 89699, 2010 WL 2690371 (Mo. Jun. 29, 2010); *State v. Dorsey*, — S.W.3d —, No. SC 89833, 2010 WL 2796540 (Mo. Jul. 16, 2010). All three decisions are discussed in greater detail below.

LETHAL INJECTION ROUNDUP

On June 28, 2010, the U.S. Supreme Court denied certiorari in the case of *Clemons v. Crawford*, 585 F.3d 1119 (8th Cir. 2009). The *Clemons* litigation attacked the qualifications and professional competence of Missouri's lethal injection team, based on documented problems with previous executions. The Eighth Circuit upheld the district court's grant of judgment on the pleadings, ruling that the prisoners did not state a viable Eighth Amendment claim. Several weeks after the cert denial in *Clemons*, the Missouri Supreme Court scheduled Roderick Nunley's execution for October 20.

Other Missouri developments are more promising. On March 2, 2010, the U.S. District Court declined to dismiss a case asserting that the state's method of execution violates the federal Controlled Substances Act and the Food, Drug, and Cosmetics Act by, among other things, failing to provide for a

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licensed medical practitioner to issue a valid prescription for the schedule III controlled substance sodium thiopental. *See Ringo v. Lombardi*, — F. Supp. 2d —, No. 09-4095-CV-C-NKL, 2010 WL 750055 (W.D. Mo. Mar. 2, 2010). Thiopental serves the constitutionally required and medically therapeutic purpose of sedating the prisoner so that he suffers no pain from the other lethal injection drugs: pancuronium bromide (which stops all muscle movement and induces suffocation), and potassium chloride (which stops the heart but otherwise causes extreme burning). Five months after its earlier ruling, the court again declined to dismiss the case on the state defendants' motion for judgment on the pleadings. *See Ringo v. Lombardi*, No. 09-4095-CV-C-NKL, 2010 WL 3310240 (W.D. Mo. Aug. 19, 2010). The court allowed the state to take an interlocutory appeal of its ruling, but the Eighth Circuit refused to entertain the appeal. *See Ringo v. Lombardi*, Eighth Circuit Case No. 10-8024 (order of Sept. 13, 2010). It remains to be seen whether developments in the *Ringo* litigation will yield a stay of Roderick Nunley's execution.

Still more promising are developments in Arkansas. Thanks to three stays entered by the Arkansas Supreme Court, the state's death penalty is effectively on hold pending a state court challenge to Arkansas's bizarre "Method of Execution Act." The state court case is *Jones et al. v. Hobbs*, No. CV-2010-1118 (Circuit Court of Pulaski County). Citing the non-delegation doctrine, the litigation challenges the statute's essentially limitless grant of decisionmaking authority to the Department of Corrections. Other challenges in the case include alleged violations of the state's Nurse Practitioner Act, as well as the federal Controlled Substances Act and the Food, Drug, and Cosmetics Act. A parallel federal case asserts that the Method of Execution Act violates the *ex post facto* clause by allowing execution methods more painful than those used previously. *See Jones et al. v. Hobbs*, Eighth Circuit Case No. 10-2899.

NEBRASKA NARROWLY REJECTS STUDY TO DETERMINE DEATH PENALTY COSTS

On March 25, the Nebraska Senate split 22-22 – and thus rejected – whether to fund a $50,000 study aimed to determine that exact cost of the death penalty. The vote fell one short of the majority needed for passage. Numerous proponents of the death penalty were co-sponsors of the proposal, believing that legislators need accurate information in order to make sound decisions about the death penalty, particularly in light of the budget crises that so many states are facing.

In related developments, a records request by the ACLU revealed that the state has spent over $33,000 preparing to switch from the electric chair to lethal injection as its method of killing. This fact runs contrary to the attorney general's estimate of "no fiscal impact," which was attached to the legislative bill making lethal injection the state's method of execution.

ALL SIXTH CIRCUIT'S WRITS REVERSED

Sadly, when the Supreme Court announced its unanimous reversal in *Berghuis v. Thompkins*, it marked the fifth reversal of Sixth Circuit grants of habeas relief in five cases heard during the 2009-10 Supreme Court Term. The opinion is described in further detail below.

TENNESSEE GOVERNOR COMMUTES SENTENCE

On July 14, Gaile Owens, convicted of capital murder for hiring a man to kill her husband, had her sentence reduced to life by Tennessee Governor Phil Bredesen. Gov. Bredesen said the prosecution's rescission of Ms. Owens' plea deal – the man she hired to kill her husband refused to plead guilty and so her plea was rescinded – coupled with the fact that "nearly all the similar cases we looked at resulted in life-sentences" led to his decision. Additionally, the Governor said evidence that Owens' husband abused her was also persuasive. She will be eligible for parole in a few years.

TWO OHIOANS GRANTED CLEMENCY

On June 4, for only the second time in sixteen capital cases, Governor Ted Strickland granted clemency to Richard Nields. Gov. Strickland agreed with the Ohio Parole Board's vote of 4-3 to grant clemency. The Parole Board's report cited to a vigorous dissent by Ohio Supreme Court Judge Paul Pfeiffer and the Sixth Circuit's ruling that Nields' case "just barely" got over the threshold of Ohio's requirements for a death sentence..

On September 3, Gov. Strickland granted clemency to Kevin Keith. Mr. Keith had an innocence claim as to his 1994 conviction for murdering two adults and a child. Gov. Strickland said that he thought it was likely he committed the offenses, but "[u]nder these circumstances, I cannot allow Mr. Keith to be executed." Interestingly, the Parole Board voted unanimously to deny clemency.

OKLAHOMA GOVERNOR GRANTS CLEMENCY TO SMITH

Governor Brad Henry agreed with the Oklahoma Pardon and Parole Board's recommendation that Richard Tandy Smith's death sentence be commuted to life without parole. Gov. Henry had granted clemency in only two prior capital cases out of six when the Pardon and Parole Board recommended it. Amnesty International reported that six of the original jurors called for clemency after hearing mitigation evidence that was never presented to them. Though not citing specific reasons, Gov. Henry said the decision was a difficult one – because he does not like to intervene with the jury's decision – but he felt that the Pardon and Parole Board "made a proper recommendation."

ARKANSAS COURT STAYS THREE EXECUTIONS

In April, the Arkansas Supreme Court granted stays of execution to Don Davis, Stacey Johnson, and Jack Jones, Jr., in light of various challenges to the Arkansas Method of Execution Act. The prisoners argue, among other things, that the MEA grants too much power to the Department of Corrections. The State's death penalty is effectively on hold while the MEA's validity is being litigated in a Little Rock trial court.

MORE PROOF OF RACIAL BIAS

In March, University of Denver sociologist and criminologist Scott Phillips published a study in the *Law & Society Review* which said the "social status" of the victim plays a major role in whether the prosecution seeks and then obtains the death penalty. Killing someone with the highest social status – white and Hispanics with college degrees, with no criminal record, who are married – results in a death sentence six times as often as killing someone with the lowest social statute – blacks or Asians, with a criminal record, without college degree, who are single.

Similarly, on June 1, the *New York Times* reported on the findings of the Equal Justice Institute that demonstrated the exclusion of blacks and minorities from southern juries. The article also mentions the Louisiana Capital Assistance Center's finding that black veniremembers are struck three times as often as their white counterparts. The article went on to observe that "[s]tudies have shown that racially diverse juries deliberate longer, consider a wider variety of perspectives and make fewer factual errors than all-white juries . . . ."

LOS ANGELES CAN'T AFFORD HOMICIDE INVESTIGATIONS

California – which spends $137 million annually on the death penalty – is having trouble in its biggest city. The Los Angeles Police Department is having to limit overtime because of the state budget crisis. As a result, homicide detectives have had trouble following up on leads. LAPD Chief Charlie Beck said, "It has a serious impact on our ability to respond to some of the large, violent incidents we've been experiencing lately. That is especially true of homicide investigations because of the long hours they demand."

HERE'S SOME JUSTICE!

The two prosecutors associated with the trial that led to the seminal Supreme Court decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) have had ethics complaints filed against them. The complaints alleged that the two prosecutors withheld information in that case, and a hearing is set for December 4.

GOING PAPERLESS

In the future PILC will be publishing its newsletter electronically. We will be posting it on our website and will also be sending it out to an electronic listserv. Please contact us at ccampbell@pilc.net and let us know if you would 1) like to receive the newsletter via email OR 2) if you would prefer to receive a hard copy of the newsletter via regular mail.

U.S. SUPREME COURT RECENT DECISIONS

Holland v. Florida, 130 S. Ct. 2549 (2010). The Supreme Court held that 28 U.S.C. § 2244(d) is subject to equitable tolling relating to its one-year deadline for federal habeas petitions from state court. Mr. Holland filed a pro se habeas petition in federal court five weeks late. Nevertheless, the Court was troubled by the misconduct of Mr. Holland's appointed habeas counsel. Counsel failed to inform his client of the filing deadline, failed to tell him the state habeas process had been completed, and failed to respond to numerous letters from Mr. Holland regarding the status of his case.

The Court agreed with eleven different circuit courts and held equitable tolling applies to § 2244(d), with the principal justification being it is like other nonjurisdictional limitation periods, which are subject to a "rebuttable presumption in favor of equitable tolling." The Court suggested, but did not rule, that the conduct of Mr. Holland's attorney was so egregious as to be deserving of equitable relief, and distinguished it from a "garden variety . . . of excusable neglect" by counsel. The Court remanded Mr. Holland's case to determine if his counsel's performance rose to the level of extraordinary circumstances contemplated in the Court's standard for equitable tolling.

Sears v. Upton, 130 S. Ct. 3259 (2010). In an unsigned per curiam summary decision the Supreme Court held that Mr. Sears' attorney's strategy to portray his childhood as "essentially without incident" in order to show the jury how imposing death would devastate his family was inadequate as a mitigation investigation, because Mr. Sears' childhood was wrought with abuse – specifically head injuries – so serious doctors said his capacity was impaired. The Court echoed the sentiments of the Georgia trial court, calling the mitigation work facially unconstitutional. The Court paid heavy attention to Mr. Sears' exceptionally low cognitive scores – he consistently tested in the first percentile – which psychologists blamed on frontal lobe abnormalities that were seemingly caused by physical abuse.

The Georgia courts dismissed the action because *some* mitigation evidence was presented, and thus they stated it

would be impossible to determine if Mr. Sears was prejudiced compared to the many cases where "little or no mitigation evidence is presented . . . ." The Supreme Court disagreed. First, the Court said the state court placed too much emphasis on the reasonableness of the mitigation case Mr. Sears' counsel presented, because the state court clearly found – and the Supreme Court agreed – the mitigation investigation facially unconstitutional. And second, the application of prejudice under *Strickland* has never been limited to cases where "little of no mitigation evidence is presented." The case was remanded for a more probing factual inquiry.

Graham v. Florida, 130 S. Ct. 2011 (2010). In a case that is sure to spawn further litigation, the Supreme Court disallowed the sentence of life without parole for juvenile offenders convicted of non-homicide offenses. This marks the first time the Supreme Court has applied such a categorical rule in a non-capital context.

Using the categorical approach under the Eight Amendment's Cruel and Unusual Punishment Clause, the Court sought to determine the objective indicia of a national consensus. It ruled that while thirty-seven states and the District of Columbia allow sentences of life without parole for juveniles who commit non-homicide offenses, that is less indicative than the actual *use* of the sentence – only twelve states impose such sentences, with Florida imposing the lion's share. The Court leaned heavily on the lessened maturity of juveniles and observed that the denial of any opportunity for parole is especially harsh. Additionally, the Court found no penological justifications for this sentencing practice, and as such, it was disproportionate to the offense.

The opinion is unclear as to what will happen to Mr. Graham – sentenced at age 16 in 2006 – or any other affected individuals because it does not mandate that parole be granted or specify what review those currently incarcerated under such sentences are to receive. The Court only required a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation."

Berghuis v. Smith, 130 S. Ct. 1382 (2010). The Supreme Court unanimously reversed the Sixth Circuit's grant of habeas relief on Mr. Smith's claim that his 1993 conviction for second-degree murder and firearm possession by an all-white jury was obtained in violation of his Sixth Amendment right to a jury drawn from a fair cross section of the community. Mr. Smith's venire panel included three African-Americans out of a panel of sixty to a hundred people. The Court applied the three-part test from *Duren v. Missouri*, 439 U.S. 357 (1979) – a distinctive group, that group is underrepresented, and "systematic exclusion" explains the underrepresentation – and distinguished Mr. Smith's case from *Duren* in its denial of habeas relief because Mr. Smith could not prove Michigan systematically excluded African-Americans.

At issue is whether *Duren* requires consideration of "relative" disparities, as opposed to "absolute" disparities, in evaluating claims of systematic exclusion. For example, if African-Americans comprise twenty percent of a jurisdiction's juror-eligible population, but only ten percent of a particular venire, we would say that the "absolute" disparity is ten percent (twenty minus ten), while the "relative" disparity is fifty percent (ten percent is half of twenty percent).

Ultimately, the Michigan Supreme Court rejected Smith's claim for lack of proof of "systematic exclusion" under *Duren* and hence rejected use of relative disparity. The Supreme Court agreed and said all of the various methods of determining underrepresentation are imperfect. The court unanimously ruled that failing to use the relative disparity test is not an unreasonable application of *Duren*.

Padilla v. Kentucky, 130 S. Ct. 1473 (2010). The Supreme Court reversed the Kentucky Supreme Court and held that counsel performed ineffectively by advising his client to plead guilty, but without advising him of the possibility that he would be deported as a result of the plea. Here, Mr. Padilla's attorney failed to advise him of the consequences of pleading guilty and said to not worry about deportation because he was a forty-year lawful permanent resident. The court declined to draw various distinctions being advocated by the State, such as counsel's failure to advise the client of direct vs. collateral consequences of the plea, or counsel's failure to inform the client vs. affirmatively misinforming him. The Court remanded for consideration of whether Mr. Padilla was prejudiced under *Strickland v. Washington*, 466 U.S. 668 (1984).

Renico v. Lett, 130 S. Ct. 1855 (2010). The Court reversed the Sixth Circuit's grant of habeas relief on Mr. Lett's claim that the mistrial ordered by the judge in his first trial barred his conviction in his second trial because of Double Jeopardy. The original trial judge granted a mistrial because of a deadlocked jury after only four and a half hours of deliberation, because the jury submitted a series of questions asking what to do in the case of deadlock. The judge then declared a mistrial without consulting the attorneys or asking any follow-up questions of the jury. In rejecting Lett's claim under AEDPA, the Supreme Court observed that there are no hard-and-fast constitutional rules concerning how long a trial judge must allow a jury to deliberate; the issue is largely left to the trial judge's discretion under the particular circumstances of the case. In light of the trial court's broad discretion, as well as the broadly-stated rule of constitutional law, the Supreme Court ruled that the state courts did not unreasonably apply *Arizona v. Washington*, 434 U.S. 497 (1978), *United States v. Perez*, 22 U.S. 579 (1824), or any other clearly-established federal law.

Magwood v. Patterson, 130 S. Ct. 2788 (2010). The Court ruled that Mr. Magwood's habeas petition relating to his re-sentencing – he had already been granted habeas relief on the original sentence – was not an unreviewable "second or successive" petition under 28 U.S.C. § 2244(b).

Mr. Magwood's original habeas relief was granted because the state court did not find aggravating factors, which were required at that time for the imposition of the death penalty in Alabama. He was granted a new sentencing phase where he was again sentenced to death. Mr. Magwood's second habeas petition argued that he was not given fair warning that he could receive the death penalty at his first sentencing.

A sharply divided court ruled that Mr. Magwood's "fair warning" claim was permissibly brought following his re-sentencing, even though Mr. Magwood theoretically "could" have brought that claim on his initial habeas petition. The initial petition resulted in his earlier death sentence being vacated, and thus, the "fair warning" claim permissibly attacked the second judgment, even though it "could" have been used to attack the first judgment.

Jefferson v. Upton, 130 S. Ct. 2217 (2010). In another summary reversal, the Court remanded a pre-AEDPA capital habeas petition for further proceedings. This case was governed by habeas law that existed pre-AEDPA, because Mr. Jefferson's petition was filed the day before AEDPA was signed by President Clinton. The Court ruled that if any of the eight enumerated exceptions applied under the previous version of 28 U.S.C. § 2254(d), then the "state court's fact finding is not presumed correct."

Mr. Jefferson's IAC claim was based on his attorneys' failure to follow up on a request by a psychologist to test whether the serious head injury he sustained as a child could explain his actions. Shockingly, a confused post-conviction judge – confused regarding Mr. Jefferson's habeas petition and how to treat the psychologist's request to further test the brain injury – made an *ex parte* request to the State asking it to write the opinion on the post-conviction case. The State complied. The Georgia Supreme Court then affirmed the finding, adopting it verbatim. The Eleventh Circuit denied habeas relief, believing that the state court's factual findings were presumed correct, but analyzing only one of the eight statutory exceptions to that presumption.

In Mr. Jefferson's case, subparagraph (2) of former § 2254(d) – situations where a full and fair evidentiary hearing was not obtained in state court – seemed to apply. The Court heavily suggested, but did not find, that subparagraph (2) applied to the judge's *ex parte* request for the State to write the opinion. The Court also observed that the Eleventh Circuit applied only one of the eight exceptions in its analysis, and was thus in error. Upon remand, the courts are to determine whether the state court's factual findings warrant a presumption of correctness.

Skilling v. United States, 130 S. Ct. 2896 (2010). The Court held that former Enron executive Jeffrey Skilling was not entitled to a change of venue despite Mr. Skilling's argument that the atmosphere in Houston, Texas, in 2006 justified a "presumption of prejudice." The Court also held that the jury selection process did not result in "actual prejudice" that contaminated Mr. Skilling's trial.

The Court stated that a "presumption of prejudice" attends only in "extreme cases," and it distinguished Mr. Skilling's situation from that in *Rideau v. Louisiana*, 373 U.S. 723 (1963), in four main areas. First, the size of Houston was much greater than 150,000 person community in *Rideau*. Second, the information conveyed were not as vivid and unforgettable – Rideau had his admission of guilt broadcast multiple times on local television – and it can be inferred from the several mentions of other cases that were violent crimes that the white collar nature of this offense made it less vivid. Third, Mr. Skilling's case was delayed over four years after Enron's collapse while other authorities in this area had trials swiftly following the crime. "Finally, and of prime significance," Mr. Skilling's jury acquitted him on some of the charges, which the Court said undermines any argument for juror bias.

The court also ruled that the record of jury selection from Skilling's trial did not reflect "actual prejudice," and it distinguished the case from the circus-like trial atmosphere of *Irvin v. Dowd*, 366 U.S. 717 (1959).

Berghuis v. Thompkins, 130 S. Ct. 2250 (2010). Continuing its evisceration of *Miranda v. Arizona*, 384 U.S. 436 (1966), the Supreme Court reversed the Sixth Circuit's grant of habeas relief. The court held that, in order to invoke the right to remain silent the suspect must clearly state such, and if a suspect responds – even a one word answer, as was the case here – that response can be construed as a waiver and the statement can be used as evidence.

Mr. Thompkins sat "largely" silent for over three hours – giving a few responses like "no" or "I don't know" – until he answered "yes" when asked whether he would ask God for forgiveness for shooting the victim. The Court held that sitting silent for a period of time is not an unambiguous assertion of the right to silence – the standard previously mandated in *Davis v. United States*, 512 U.S. 452 (1994), for invoking the right to counsel – and thus *Miranda* was not violated. Then, the Court ruled that such a response – an uncoerced statement – in tandem with an appropriate *Miranda* warning that was understood by the suspect, constitutes a waiver under *Miranda*.

The Court also reversed the Sixth Circuit's grant of relief on a claim that counsel was ineffective for not requesting a curative instruction to remedy the prosecutor's misconduct on closing argument. The Court held that Thompson could not establish

Strickland prejudice for the claim, in light of abundant evidence of his guilt beyond the testimony involving the misconduct.

United States v. Marcus, 130 S. Ct. 2159 (2010). The Supreme Court reversed the Second Circuit's interpretation of the plain-error rule and reiterated its four-part test of the rule codified as Fed. Rule Crim. Proc. 52(b). Mr. Marcus appealed his forced labor and sex trafficking convictions on the basis that they violated the *Ex Post Facto* Clause. The argument was not raised at trial, but the Second Circuit vacated the convictions on "plain error" review.

The Supreme Court reversed that decision because it did not comply with its four-part test for plain error – error, that is clear and obvious, that affected appellant's substantial rights, and that which seriously affects integrity of judicial proceeding – because it did not comport with the third and fourth parts of the test. Additionally, the Court rejected any type of special treatment for *ex post facto* claims, instead herding them into the general Rule 52(b) plain-error framework.

CERT GRANTED

Harrington v. Richter, 130 S. Ct. 1506, No. 09-587 (2010). The Court granted cert on the following question presented: (1) In granting habeas corpus relief to a state prisoner, did the Ninth Circuit deny the state court judgment the deference mandated by 28 U.S.C. § 2254(d) and impermissibly enlarge the Sixth Amendment right to effective counsel by elevating the value of expert-opinion testimony in a manner that would virtually always require defense counsel to produce such testimony rather than allowing him to rely instead on cross-examination or other methods designed to create reasonable doubt about the defendant's guilt? Additionally, the Court directed the parties to brief and argue (2) Does AEDPA deference apply to a state court's summary disposition of a claim, including a claim under *Strickland* v. *Washington*, 466 U.S. 668 (1984)?

Walker v. Martin, 130 S. Ct. 3464, No. 09-996 (2010). The Court granted certiorari to hear the following question: "Under state law in California, a prisoner may be barred from collaterally attacking his conviction when the prisoner 'substantially delayed' filing his habeas petition. In federal habeas corpus proceedings, is such a state law 'inadequate' to support a procedural bar because (1) the federal court believes that the rule is vague and (2) the state failed to prove its courts 'consistently' exercised their discretion when applying the rule in other cases?"

Cullen v. Pinholster, 130 S. Ct. 3410, No. 09-1088 (2010). The Court granted certiorari to consider whether it was unreasonable under 28 U.S.C. § 2254 for a state court to deny habeas relief because petitioner could have – but did not – present his claim in state court, and whether petitioner's IAC claim –counsel interviewed a handful of family members and one psychiatrist and did not present an organic brain damage mitigation case nor petitioner's difficult childhood – has merit.

Skinner v. Switzer, 130 S. Ct. 3323, No. 09-9000 (2010). The Court stayed Mr. Skinner's execution and granted certiorari to hear the following question: "May a convicted prisoner seeking access to biological evidence for DNA testing assert that claim in a civil rights action under 42 U.S.C. § 1983, or is such a claim cognizable only in a petition for writ of habeas corpus?"

Wall v. Kholi, 130 S. Ct. 3274, No. 09-868 (2010). The Court granted certiorari on the following question: "Does a state sentence-reduction motion consisting of a plea for leniency constitute an 'application for State post-conviction or other collateral review,' 28 U.S.C. § 2244(d)(2), thus tolling the [AEDPA]'s one-year limitations period for a state prisoner to file a federal habeas corpus petition . . . ?"

Belleque v. Moore, 130 S. Ct. 1882, No. 09-658 (2010). The Court granted certiorari to consider the following two questions: First, does the *Fulminante* standard – "the erroneous admission of a coerced confession at the trial was not harmless error" – apply on a collateral challenge to an attorney's failure to suppress a confession prior to a guilty or no contest plea, and "even if [it] applies . . . , is it 'clearly established Federal law' for purposes of 28 U.S.C. § 2254(d)(1)?" Second, after the prisoner confessed to police and two witnesses, was it error for the Ninth Circuit to grant habeas relief for IAC – based on the attorney's failure to suppress the confession – without evidence that Mr. Moore would have insisted on going to trial?

Michigan v. Bryant, 130 S. Ct. 1685, No. 09-150 (2010). In yet another case examining the Court's recent interpretation of the Confrontation Clause in *Crawford v. Washington*, 541 U.S. 36 (2004), the Court granted certiorari on the following question: "[W]hether preliminary inquiries of a wounded citizen concerning the perpetrator and circumstances of the shooting are nontestimonial because [they are] 'made under circumstances objectively indicating [that] the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency,' that emergency including not only aid to a wounded victim, but also the prompt identification and apprehension of an apparently violent and dangerous individual?"

EIGHTH CIRCUIT DECISIONS

Sinisterra v. United States, 600 F.3d 900 (8th Cir. 2010). The Eight Circuit partly affirmed and partly reversed the district

court's denial of § 2255 relief to federal death row prisoner German Sinisterra. It ordered the district court (W.D. Mo.), to hold an evidentiary hearing on Sinisterra's IAC claim, alleging that counsel failed to investigate and present mitigating evidence of childhood abuse – both physical and sexual – along with prolonged periods of homelessness in his native Colombia. Additionally, counsel did not present evidence of head injuries or mental health problems.

The Eighth Circuit said an evidentiary hearing is necessary to answer "a number of questions related to [Mr. Sinisterra's] attorneys' performance" along with the credibility – and ability to present evidence to support – of his factual assertions regarding his incredibly horrific childhood.

Interestingly, the Eighth Circuit interpreted Mr. Sinisterra's mitigation claims – alleged rape, physical and sexual abuse, homelessness [and] head injuries – as the type information relevant to assessing moral culpability, and used this circumstance to find harmony in the seeming discord of the Supreme Court's three recent decisions concerning prejudice in IAC claims: *Bobby v. Van Hook*, 130 S. Ct. 13 (2009); *Wong v. Belmontes*, 130 S. Ct. 383 (2009); *Porter v. McCollum*, 130 S. Ct. 447 (2009). In our October-December 2009 Newsletter, we pointed out the difficulty in reconciling the three case with one another, but the Eighth Circuit had no such trouble. The court reasoned that prejudice cannot generally be found when a jury is already familiar with similar evidence, or when the new facts offer only minor details. Nevertheless, citing *Porter*, the court observed that "significant" new information may give rise to a finding of prejudice, such as Porter's heroic military service, struggles adapting to home post-war, child abuse, brain irregularities, and illiteracy.

Jackson v. Norris, -- F.3d --, No. 09-1229, 2010 WL 3155187 (8th Cir. Aug. 11, 2010). In this capital habeas case from Arkansas, the Eighth Circuit ordered an evidentiary hearing as to Alvin Jackson's *Atkins* claim. This is the second time the Eighth Circuit has remanded this case for further proceedings. Originally, the district court found Mr. Jackson's claims to be procedurally barred, to which the Eighth Circuit disagreed and remanded for further proceedings. Then the district court granted summary dismissal without an evidentiary hearing, and the Eighth Circuit again reversed and remanded.

The court held that the Arkansas' pleading requirements were met by Mr. Jackson, and the denial of an evidentiary hearing was improper. Arkansas' standard for showing mental retardation requires (1) significant subaverage general intellectual functioning manifested before 18 years old; (2) significant deficits in adaptive functioning manifested before 18 years old; and (3) a deficit in adaptive behavior. The Eighth Circuit focused, principally, on the second prong because the first prong was found by the district court and it ruled the third prong requires the same facts as the second. In a lengthy factual inquiry, it held that Mr. Jackson did have a significant deficit in adaptive functioning – which requires significant limitations in two or more of areas of day-to-day functioning. The court found that Mr. Jackson appeared to have significant limitations with social/interpersonal skills and functional academic skills, and this this showing entitled Mr. Jackson to a hearing.

Storey v. Roper, 603 F.3d 507 (8th Cir. 2010). The Eighth Circuit affirmed the district court's denial of habeas relief to Missouri death row prisoner Walter Timothy Storey. At the outset, the Eighth Circuit rejected the State's argument that Storey's habeas petition was untimely. Following its recent opinions in *Polson v. Bowersox*, 595 F.3d 873 (8th Cir. 2010), and *Bishop v. Dormire*, 526 F.3d 382 (8th Cir. 2008), the court reaffirmed that Rule 91 petitions and motions to recall the mandate are considered "other collateral review" and thus toll the one-year statute of limitation in 28 U.S.C. § 2244.

Mr. Storey's clams relating to inadequate notice of victim impact witnesses at his resentencing was denied principally because counsel did not cross examine other victim impact witnesses of whom he *did* have notice. Mr. Storey's due process challenge to the admission of multiple exhibits – ranging from photos of a memorial garden built in the victim's memory to a copy of the eulogy read at the victim's funeral – failed because the State has the right to present the "individuality" of the victim during the penalty phase. The court noted some of the victim impact testimony did not focus on the "individuality" of the victim and the impact of losing the victim, but the court ruled that Mr. Storey was not prejudiced. .

Additionally, the court rejected Mr. Storey's argument that twice having sentencing juries not find the "pecuniary gain" aggravating circumstance should have barred its submission to the third sentencing jury under the Double Jeopardy clause. The court said Mr. Storey was never acquitted of the death penalty just as in *Poland v. Arizona*, 476 U.S. 147 (1986), so Double Jeopardy did not bar the prosecution's subsequent attempts to impose it.

Williams v. Norris, -- F.3d --, No. 09-1062, 2010 WL 2772676 (8th Cir. July 15, 2010). In this capital habeas case, the Eighth Circuit affirmed the denial of relief to Arkansas prisoner Kenneth Dewayne Williams, who was convicted of two killings after he escaped from prison on an earlier murder conviction. Chief among the seven claims rejected by the court was a claim that the trial court committed *Lockett* error by excluding evidence that prison officials acted negligently in allowing Williams' escape in a garbage truck. The court upheld as "reasonable" the Arkansas Supreme Court's ruling that such evidence did not relate to the defendant's character or background, or the circumstances of the crime, and also that any error was harmless. The court also upheld, despite *Ake v. Oklahoma*, 470 U.S. 68 (1985), the state courts' denial of funding for Mr. Williams to hire a corrections expert to further

develop the issue of the prison's negligence. Also rejected was a claim that the victim impact testimony extended beyond that permitted by *Payne v. Tennessee*, 501 U.S. 831 (1991), when the victim's sister said that the jury could "do something" and was "in a position" to act.

Jones v. Hobbs, 604 F.3d 580 (8th Cir. 2010). The Eighth Circuit vacated the stays of execution granted for two inmates who intervened in the lawsuit of another death row inmate in Arkansas. The district court had already vacated the stay for the named defendant. At issue here is the constitutionality of Arkansas' Methods of Execution Act. As the dissent points out, this new act "grants to the Director of the Arkansas Department of Corrections virtually unfettered discretion to modify the method of execution, including, the chemicals to be used, the procedure to be employed, the qualifications and training of the medical personnel assisting in the execution, and the method of the insertion of the intravenous line. The statute goes on to exempt from the Arkansas Freedom of Information Act any changes to the protocol, with the exception, of the quantity, method, and order of the chemicals to be administered."

The majority held that petitioners must demonstrate a "significant possibility of success on the merits" when it challenges the manner in which the State plans to execute them. It went on to say that the likelihood of irreparable harm is not enough, and the petitioners' challenge was merely speculative.

The dissent agreed that the test should be a "significant possibility of success" but argued that the prisoners had demonstrated such a possibility. Additionally, the dissent stated "the irreparable harm of going forward with an execution under a possibly unconstitutional execution statute" coupled with the possibility of success justified the district court's decision to grant stays.

Since this decision, in early April, the Supreme Court of Arkansas granted stays for all three men, which was discussed above in the Noteworthy News section. The stays were granted in connection with different challenges to the Method of Execution Act.

Howard v. Norris, -- F.3d --, No. _, 2010 WL 3168468 (8th Cir. Aug. 12, 2010). The Eighth Circuit denied the State of Arkansas' interlocutory appeal of the district court order staying Timothy Howard's habeas proceedings pending exhaustion of state court remedies. The State argued Mr. Howard's state court claims are procedurally barred, so there are no unexhausted claims. The court agreed with Mr. Howard that the collateral order doctrine does not apply because the disputed issue of procedural default can be addressed on appeal from a final order.

Dodd v. United States, -- F.3d --, No. 09-3345, 2010 WL 2945717 (8th Cir. July 29, 2010). On the issue of timeliness, the Eighth Circuit reversed the denial of relief in this non-capital § 2255 case. Dodd originally filed a *pro se* petition, but then counsel was appointed, who filed an amended petition that failed to comply with the one-year statute of limitations. Untimely §2255 motions are timely if they relate back to the original petition, and at issue here was whether the amended claims related back to the original claims. The Eighth Circuit disagreed with the district court and held that one of the eight claims related back. The court said it must construe pro se petitions liberally, and found that the core of facts between the amended petition and the pro se petition were sufficiently similar to satisfy the "relation back" test. The court remanded the one issue to the district court for a determination of the merits.

Lindsey v. United States, -- F.3d --, No. 09-2907, 2010 WL 3168387 (8th Cir. July 29, 2010). The Eighth Circuit denied habeas relief in this felon in possession case where Mr. Lindsey was sentenced as a career offender. One of Mr. Lindsey's prior violent felonies – two were required for his level of sentencing – was a DUI conviction. The court noted that *United States v. Begay*, 533 U.S. 137 (2008), held that DUIs are not violent felonies, and the Eighth Circuit held recently in *Sun Bear v. United States*, No. 09-2992, 2010 WL 2813620 (8th Cir. July 20, 2010) that *Begay* applies retroactively. Unfortunately, relief was still denied because Mr. Lindsey had procedurally defaulted by not appealing the issue on his direct appeal – despite its futility – because the court ruled that legal futility is not grounds for "cause."

White v. Dingle, -- F.3d --, No. 09-1415, 2010 WL 3190678 (8th Cir. Aug. 13, 2010). In this noncapital habeas case from Minnesota, the Eighth Circuit affirmed the district court's ruling that the amended petition did not "relate back" to an earlier "mixed" petition, which had been denied without prejudice for non-exhaustion. Nevertheless, the court ruled that Mr. White was entitled to equitable tolling under *Holland v. Florida*, 130 S. Ct. 2549 (2010), noting that the Eighth Circuit itself had been at fault for not remanding the initial habeas petition with instructions that district court consider Mr. White's exhausted claim on the merits. Had such a remand been issued -- as it should have been -- there would have been a pending habeas petition to which Mr. White's amended claim could have related back. White was therefore not at fault for the resulting procedural conundrum. It is particularly noteworthy that the Eighth Circuit made its *Holland* ruling beyond the certificate of appealability that the district court had granted (which related solely to the issue of whether the amended petition related back to the previously dismissed one). The court observed that it has the discretion to address issues beyond the COA, and may do so in the interest of justice.

Sun Bear v. United States, 611 F.3d 925 (8th Cir. 2010). Marlon Dale Sun Bear had his 360-month sentence, which included an enhancement for being a career criminal, reversed

and remanded. The Eighth Circuit held that *Begay v. United States*, 553 U.S. 137 (2008), was retroactive, and as such, Mr. Sun Bear could not be sentenced as a career criminal for attempted theft of a vehicle or attempted burglary because they are not violent felonies. *Begay*'s retroactivity was found because the court viewed it as more of a substantive rule than procedural.

White v. McKinley, 605 F.3d 525 (8th Cir. 2010). Plaintiff Ted White – who was convicted and later acquitted of molesting his adopted daughter – had his § 1983 victory affirmed by the Eighth Circuit. Mr. White's suit against Richard and Tina McKinley, the Lee's Summit detective and Mr. White's ex-wife, resulted in a jury award of $14 million in actual damages and another $2 million in punitive damages. The prosecution and the Lee's Summit police department failed to disclose Detective McKinley's relationship to Tina McKinley during his investigation of Mr. White. Additionally, Detective McKinley failed to preserve the daughter's diary, which said Mr. White was a good father and she wished he spent more time with her. The City of Lee's Summit was originally named in this lawsuit, but agreed to indemnify Detective McKinley in order to be dropped as a named defendant. Lee's Summit is now contesting that indemnification. [Note: Mr. White was represented by PILC during his successful state post-conviction action as well as two criminal retrials].

FEDERAL DISTRICT COURTS UNDER THE EIGHTH CIRCUIT

Williams v. Roper, No. 05-1474 (E.D. Mo. Mar. 25, 2010) (unpublished). The federal district court granted penalty phase habeas relief to Missouri death row inmate Marcellus Williams, on a claim that trial counsel failed to investigate and present adequate mitigating evidence from Mr. Williams' background. The Missouri courts denied the same claim, denying a hearing and crediting as "reasonable" counsel's decision to rely on a penalty phase strategy of residual doubt. That ruling was unreasonable, the federal district court ruled, because counsel's purported "strategy" did not excuse counsel's broader failure to investigate his client's life history. The court noted that strategic choices are "virtually unchallengeable but only if the choice is made ***after*** a thorough investigation." The court admonished the Missouri state courts for not holding a hearing on the issue, which would have revealed the "residual doubt" argument to be a "defense strategy by default because trial counsel failed to properly prepare mitigating evidence which would have allowed [them] to make a competent penalty phase strategy decision."

SIGNIFICANT DECISIONS FROM OTHER CIRCUITS

In re Webster, 605 F.3d 256 (5th Cir. 2010). The Fifth Circuit harshly denied Mr. Webster's motion to authorize a second § 2255 petition targeting Webster's death sentence, on account of his mental retardation. Webster's initial § 2255 petition argued that he was ineligible for execution under *Atkins v. Virginia*, 536 U.S. 304 (2002), but the claim was rejected on the merits. Webster sought to bring a new post-conviction action based on newly discovered evidence, including Social Security and school records as well as additional testimony, which, he claimed, would compel a reasonable factfinder to conclude he is mentally retarded. The new evidence included the findings of three doctors whom Mr. Webster visited when seeking Social Security benefits in 1993. All three concluded he was mentally retarded and one doctor scored his IQ at 59. The Fifth Circuit took a narrow view of 28 U.S.C. § 2255(h)(1) – allowing successive motions only if newly discovered evidence would establish no reasonable fact finder could find the "movant guilty of the offense" – by saying Mr. Webster's alleged retardation is not germane to guilt, and thus a successive motion could not be filed. Mr. Webster asked that "offense" – under § 2255 – be construed more broadly than conviction, and include the sentence. The Fifth Circuit leaned heavily on the rationale in *Hope v. United States*, 108 F.3d 119 (7th Cir. 1997), saying that § 2255 was Congressionally-created, so its plain meaning cannot be taken to include the associated death sentence as was the case of the definition for "actual innocence" prior to the AEDPA. Concurring, Judge Wiener said the statutory interpretation is correct, but such a decision is illogical. Judge Wiener said that unconstitutional sentences are not challengeable under this law, and essentially, Congress has forced judges to affirm unconstitutional death sentences. He called such a result "Kafkaesque."

Holmes v. Levenhagen, 600 F.3d 756 (7th Cir. April 2, 2010). In a truly fascinating case and opinion, the Seventh Circuit – for the third time in nine years – disagreed with the district court's assessment of Mr. Holmes' competence in this capital habeas case, and suspended his habeas proceeding until the state can produce substantial new evidence that his mental illness has abated. The court called Mr. Holmes plainly "insane" and incompetent to assist counsel in the prosecution of his federal habeas claims. The extent of Mr. Holmes' insanity is obvious, and its impact on the case is direct. He testified that he doesn't read documents relating to his case, because it will enable the supernatural spirits who inhabit his prison cell to interfere with his habeas proceeding. He has stated the spirits call him Archangel Gabriel – he's uncertain if this is positive or negative – and he has converted to Islam taking the name "Koor An Nur of Katie Mary Brown." Perhaps most stunting to his ability to communicate with his attorneys, Mr. Holmes is obsessed with one part of the case,

and cannot discuss the case without navigating the conversation back to this issue.

Judge Posner stated that the decision to plead incompetence as opposed to filing a claim on the merits is "all-important" and "not really a lawyer's decision at all." Ultimately, this "all-important" decision was one the court deemed Mr. Holmes could not make.

The court flatly rejected the state's psychiatrist's assessment that because Mr. Holmes could answer simple questions – like what would you do if you found an addressed envelope on the ground, to which he said he'd put it in the mail – he could communicate with his lawyers. The court noted that schizophrenics often have moments of lucidity, but that is not enough to demonstrate a capacity to communicate with his lawyers. Finally, the court noted it would be "distasteful" to force Mr. Holmes to take antipsychotic drugs in an effort to clear the way to his execution.

Richie v. Workman, 599 F.3d 1131 (10th Cir. 2010). The Tenth Circuit affirmed the district court's decision to grant a new trial in this capital habeas case. Mr. Richie was convicted of first-degree murder, but his defense attorneys protested that he only restrained the victim in a reckless manner, which led to her death. The victim's body was found in a position consistent with the defense theory. The trial judge did not grant Mr. Richie's request for an instruction on second-degree murder. After a lengthy factual analysis of the crime, the Tenth Circuit said the second-degree murder instruction is required by *Beck v. Alabama*, 447 U.S. 625 (1980), because the evidence could reasonably support such a finding.

Phillips v. Workman, 604 F.3d 1202 (10th Cir. 2010). The Tenth Circuit granted Mr. Phillips' request for a retrial in his capital habeas appeal, also on a *Beck* violation. Mr. Phillips was convicted of first-degree murder for stabbing a stranger during a period of depression and alcoholism for Mr. Phillips. Mr. Phillips' satisfied his *Beck* claim by showing that second-degree murder is actually a lesser included offense of first-degree murder and that the evidence would permit a reasonable juror to find him guilty of the lesser offense. Interestingly, Oklahoma's Court of Criminal Appeals held for a short time that second-degree murder is not a lesser included offense of first-degree murder. However, at the time of Mr. Phillips' direct appeal and a petition for rehearing, the OCCA held it *was* a lesser included offense. This fact proved important, because the Tenth Circuit noted that if either appeal occurred during a period when OCCA – despite the wrongness of the holding – held it was not a lesser included offense, then Mr. Phillips would not be entitled to the relief granted to him. Ultimately, the Tenth Circuit admonished the trial court, saying its job is not to determine which offense is more likely to be found, but only whether the lesser offense could be found by a reasonable juror. Much of the error in the Oklahoma courts occurred because they focused too intently on facts that proved murder in the first-degree, and not whether a juror could reasonably find second-degree murder.

Stanley v. Schriro, 598 F.3d 612 (9th Cir. 2010). The Ninth Circuit ordered the district court to hold an evidentiary hearing on Mr. Stanley's penalty phase IAC claim. Trial counsel did not inform the defense experts that Mr. Stanley was suffering from a dissociative reaction at the time he murdered his wife and child. The experts have since said such information would have changed their testimony, and helped mitigate the depravity of the crime. The Ninth Circuit held that failing to inform the experts violated the first prong of *Strickland*. The court did not rule on whether Mr. Stanley was prejudiced by counsel's ineffectiveness, instead allowing the evidentiary hearing to illuminate that point.

Hooks v. Workman, 606 F.3d 715 (10th Cir. 2010). In yet another positive result from the Tenth Circuit, the court granted habeas relief as to Mr. Hooks' death sentence for five murders, on account of an impermissibly coercive *Allen* charge. In a lengthy step-by-step factual inquiry, the court demonstrated how a combination of prosecutorial missteps and judge-based error created an impression in the jurors' minds that they had to reach a unanimous verdict. The missteps were numerous, but thankfully, the Tenth Circuit neatly summarized the situation: "From the initial jury instructions, focused narrowly on the concept of unanimity; to the misconduct on the part of the prosecutors, designed to mislead the jury about its role in the sentencing process and the need for unanimity; to the note from the jury singling out a lone juror as operating outside the law by refusing to concur in a death verdict, a note demonstrating the jury's misunderstanding of law consistent with the prosecutor's misleading closing arguments; to the trial court's unadorned response that it lacked the power to remove the lone dissenting juror, a response failing in any way to correct the jury's express misunderstanding of its role in the sentencing process; to the trial court's guilt-phase-focused *Allen* charge, reinforcing the need for unanimity so the 'case may be completed'; to the trial court's discussion with the jury, undertaken in response to the jury's with to return home for the evening, informing the jury its only options were to deliberate into the night or return to deliberate in the morning after spending the night at a hotel, the record in this case so indicates jury coercion that it was an unreasonable application of [federal law] for the OCCA to deny Hooks relief."

Goff v. Bagley, 601 F.3d 445 (6th Cir. 2010). The Sixth Circuit granted relief in this capital habeas case for IAC by appellate counsel. Mr. Goff was denied his right to allocution before sentencing, and appellate counsel did not raise this issue. Ohio law holds that such a mistake is reversible error, and therefore, the Sixth Circuit ruled that counsel's failure to raise such "an obviously winning claim" amounted to deficient performance under *Strickland*. Given that the allocution error would have been *per se* reversible on appeal,

the court ruled that Mr. Goff was prejudiced by appellate counsel's deficient performance. The court remanded with directions to grant the writ unless the Ohio courts re-open Mr. Goff's direct appeal within 120 days.

Dorn v. Lafler, 601 F.3d 439 (6th Cir. 2010). The Sixth Circuit granted relief in this noncapital case where Mr. Dorn's right of access to the courts under the Fourteenth Amendment was violated when state prison officials mishandled his appellate papers. The court spent some time discussing the affirmative obligation of the state to mail documents timely presented to them by prisoners. Here, Mr. Dorn submitted his paperwork to prison officials seven days before they were due to the court. The officials failed to get the papers to the court on time, which caused Mr. Dorn's appeal to be dismissed as untimely. The Sixth Circuit said regardless of whether the prison officials intended to deny Mr. Dorn access to the courts, "the effect was the same." This grant of habeas relief gave him a full appellate review, because the original circumstances denied Mr. Dorn that opportunity.

Winston v. Kelly, 592 F.3d 535 (4th Cir. 2010). In this procedurally rich capital habeas case from Virginia, the Fourth Circuit reversed the denial of relief and remanded for further consideration of IAC and other claims relating to Mr. Winston's mental retardation under *Atkins v. Virginia*, 536 U.S. 304 (2002). On post-conviction review, the state courts denied a hearing on the *Atkins* claim, due to Winston's failure to raise the claim on direct appeal. On the appeal as well as during the underlying trial, counsel were aware that Winston had taken multiple IQ tests and scored above 70 on all of them, but they did not know about an additional test on which Winston had scored a 66. That test, taken by a Fairfax county official, was discovered only two weeks before the federal district court held an evidentiary hearing on habeas review.

The Fourth Circuit made a number of procedurally important observations in the course of its opinion. First, on the issue of exhaustion, it held that the additional IQ score did not "fundamentally alter" the claim that Mr. Winston had presented to the state courts; therefore, the district court erred by refusing to consider the evidence for want of exhaustion. Second, the Fourth Circuit reasoned that Winston did not "fail to develop" the material facts underlying his *Atkins*-related claims. The court rejected the district court's reasoning that Winston's attorneys should have subpoenaed the missing IQ records; that device is available on post-conviction review only by direct request to the Virginia Supreme Court, and yet *that* tribunal denied Winston a hearing on his *Atkins* claim. Third, the Fourth Circuit engaged in a lengthy discussion of whether AEDPA's so-called "deference" provisions should apply on remand where, as here, a claim is based on additional evidence that was not before the state courts. The Fourth Circuit, following its precedent, ruled that Mr. Winston need not show that the state court's rulings were "unreasonable" under 28 U.S.C. § 2254(d). Nevertheless, any factual findings that were actually reached by the Virginia Supreme Court were subject to 28 U.S.C. § 2254(e)(1), so that Mr. Winston would have to present "clear and convincing evidence" to disprove them; such findings did not include an ultimate MR determination, but did involve a number of comments that the state court made about the above-70 test scores. The district court will obviously have its hands full on remand.

Robinson v. Schriro, 595 F.3d 1086 (9th Cir. 2010). The Ninth Circuit granted penalty phase relief in Mr. Robinson's capital case on two grounds. First, the court found one aggravating factor – cruel, heinous and depraved – was not supported by the evidence or generally charged in similar circumstances. It was never proven Mr. Robinson knew a homicide would transpire, or that he was in the house with his co-defendants when the homicide was committed. The court ruled, then, that the finding of that factor "is an application of Arizona law so arbitrary as to constitute an Eighth Amendment violation." Second, the court granted relief on Mr. Robinson's IAC claim based on an insufficient mitigation investigation. *Strickland*'s first prong was found because counsel did not interview members of Mr. Robinson's family after two of his sons testified against him. The court said this was not reasonably competent lawyering. It observed that a proper investigation "would have provided classic mitigation evidence at sentencing, including: Robinson's impoverished background; his unstable and often abusive upbringing; his multiple episodes of childhood sexual abuse; his low intelligence; his personality disorder; his non-violent nature; and his potential for rehabilitation." The Court also found sufficient prejudice, noting the strong mitigation case that trial counsel failed to present, balanced against only a single aggravating circumstance.

Thomas v. Allen, 607 F.3d 749 (11th Cir. 2010). In this Alabama case, the district court reviewed *de novo* the state court's adverse pre-*Atkins* findings on mental retardation. That review was permissible, the Eleventh Circuit observed, because *Atkins* is a new rule and applies retroactively. The district court found – after an evidentiary hearing – that Mr. Thomas was mentally retarded and ineligible for execution. The district court applied Alabama law and found that despite one I.Q. score above 70, he was still mentally retarded. The Eleventh Circuit reviewed that decision for clear error, and said the district court's review of Alabama state law was not in clear error for failing to adhere to a strict rule disallowing mental retardation claims if the petitioner has had an I.Q. tested above 70, because there is no case law supporting such a limitation.

In re Gardner, 612 F.3d 533 (6th Cir. 2010). Mr. Gardner – a nineteen year old with "mental age" of fourteen – was denied a stay of execution, as well as leave to file a second or successive habeas petition. The Sixth Circuit ruled that *Roper v. Simmons*, 543 U.S. 551 (2005), does not contemplate

"mental age" even though there may be policy arguments supporting such an extension. Mr. Gardner was executed by the state of Ohio on July 13.

MISSOURI SUPREME COURT

State v. Anderson, 306 S.W.3d 529 (Mo. 2010). A fractured Missouri Supreme Court upheld the death sentence imposed against Terrance Anderson for killing his estranged girlfriend and her father. A jury in Cape Girardeau County re-imposed the death penalty after Anderson's earlier death sentence was vacated on post-conviction review. Among other issues, the court rejected Anderson's claim based on the trial court's erroneous use of the previous version of the MAI penalty phase "verdict mechanics" instruction. The outdated instruction omitted the directive that the jury must impose a life sentence if it finds the mitigating evidence to outweigh the aggravating evidence. The majority held that Anderson was not prejudiced by the error, because other instructions contained this directive. Judge Wolff dissented on the instruction issue, arguing that the outdated instruction is biased in favor of the death penalty because it tells the jury how to impose death but not how to impose life.

Perhaps more importantly, Judge Wolff added the fourth and critical vote to the concurrence of Judge Breckenridge on the issue of proportionality review. Judge Breckenridge -- following her own and Judge Stith's concurrences from *State v. Deck*, 303 S.W.3d 527 (Mo. banc 2010), and joined by Judges Stith and Teitelman -- opined that the court's proportionality review *must* consider similar cases in which the defendant was sentenced to life despite the prosecution's seeking death at trial. *Anderson* is the first case in which a majority of the court subscribed to this view. Although this development is potentially far-reaching, it did not assist Mr. Anderson. On the facts of his case as compared to similar non-death as well as death cases, Judge Breckenridge found that Mr. Anderson's death sentence was not disproportionate.

State v. Davis, -- S.W.3d --, No. SC89699, 2010 WL 2690371 (Mo. June 29, 2010). In this high profile case from Jackson County, the Missouri Supreme Court upheld Richard Davis's convictions of first degree murder and other offenses, as well as his death sentence, in connection with the deaths and videotaped torture of Marsha Spicer and Michelle Huff Ricci. The court dismissed Mr. Davis' argument that the judge misled him about the resources available to *pro se* litigants – a likely violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985) – which caused Mr. Davis to allow appointed counsel to represent him in violation of his desire to represent himself under *Faretta v. California*, 422 U.S. 806 (1975). The court distinguished Mr. Davis' situation from *Ake* on the basis that it was Ake's *counsel* who requested the resources, whereas Mr. Davis sought to represent himself only if the requested resources would also be provided. Judge Teitelman dissented, believing that Mr. Davis was denied his Sixth Amendment right to represent himself. He viewed the comments by the trial judge – which led Mr. Davis to believe that he would have no resources at this disposal – to have improperly dissuaded Mr. Davis from representing himself, despite it likely being in his best interests.

As with *Anderson*, the *Davis* opinion represents an important milestone in the law governing proportionality review. The "principal opinion," written by Judge Stith and joined by three other judges, definitively states that Missouri law requires the court to consider non-death cases when conducting proportionality review. The court noted that four judges in *Anderson* endorsed this view. The separate concurrence of Judge Fischer, joined by Judges Price and Russell, continued that trio's ongoing disagreement with their four colleagues. Of course, none of the seven judges believed Mr. Davis's death sentence to disproportionate.

State v. Dorsey, -- S.W.3d --, No. SC89833, 2010 WL 2796540 (Mo. July 16, 2010). The Missouri Supreme Court unanimously affirmed the two drug-related murder convictions, as well as the death sentence, imposed on Brian Dorsey by a Boone County jury. The court rejected several attacks on the penalty phase instructions, concluding, among other things, that a jury need not find the relative weight of aggravating and mitigating circumstances beyond a reasonable doubt. The court also rejected various claims of prosecutorial misconduct, including the fact that the prosecutor described Mr. Dorsey as "evil," uttered the famous saying that "the only thing necessary for evil to triumph is for good men to do nothing," and argued that the jury would be "doing nothing" if it sentenced Mr. Dorsey to life. The court observed that an identical argument was permitted in *State v. Forrest*, 183 S.W.3d 218, 228 (Mo. 2006).

Chief Judge Price, joined by Judges Russell and Fischer, again reiterated the court's disagreement regarding what types of cases to include in proportionality review. The judges' concurrence nevertheless acknowledged that *Anderson* and *Davis* state the law in Missouri as to proportionality review, and that the minority will not separately opine on this issue in future cases.

State v. Stewart, 310 S.W.3d 785 (Mo. 2010). The Missouri Supreme Court granted a new trial after "newly discovered evidence indicates that [Stewart's] brother-in-law, whose DNA was found on a bloody hat at the crime scene, stated that he had killed someone and that he was present at the victim's murder." The only contested requirement for a new trial was whether the evidence was so material that it would likely produce a different result at trial. Here, that requirement was established because the brother-in-law's statements were made to family members, which tended to make them more reliable and to raise a substantial doubt as to Mr. Stewart's guilt.

Additionally, the victim in the case told a 911 operator as he was dying that his murderer was dating an "Eby girl" – which is the maiden name of Mr. Stewart's sister Candy Seaman, who is married to Tim Seaman (previously referred to as Mr. Stewart's brother-in-law).

Vaca v. State, 314 S.W.3d 331 (Mo. 2010). In this triple robbery case, the Missouri Supreme Court reversed the denial of Rule 29.15 relief on account of counsel's ineffectiveness during the sentencing portion of Mr. Vaca's bifurcated trial. His trial attorney had never participated in a bifurcated trial, and omitted, in sentencing, a psychologist's testimony that Mr. Vaca suffers from schizophrenia and is of quite low intelligence. The court narrowed its holding to rule that IAC occurred because counsel never considered whether or not to call the psychologist. In other circumstances, not calling a psychologist might be effective, such as if counsel strategically chooses to portray to defendant as a "good" man rather than a mentally deranged one. The court ordered a new sentencing phase for Mr. Vaca.

State v. Bateman, -- S.W.3d --, No. SC90528, 2010 WL 3279766 (Mo. Aug. 3, 2010). The Missouri Supreme Court rejected a *Batson* claim in this non-capital first-degree murder case from St. Louis City. The court held that the judge's decision to allow the prosecutor's strike of an African-American juror – when a white juror was quite similarly situated – was not clearly erroneous under the totality of the circumstances. The court noted that the existence of a similarly situated juror is "crucial" but not dispositive. Judges Teitelman and Wolff dissented, and noted that the prosecutor's reasons on the record were erroneous in that the juror was answering a question posed by the prosecutor, which the prosecutor characterized as the juror's imitative in raising the issue. The prosecutor said this was the sole reason for striking the juror. Additionally, the dissent noted that another of the prosecutor's peremptories was overruled by the trial court under *Batson.*

State ex rel. Laughlin v. Bowersox, -- S.W.3d --, No. SC90528, 2010 WL 3314704 (Mo. Aug. 3, 2010). The Missouri Supreme Court unanimously vacated Mr. Laughlin's 1993 conviction for first-degree burglary and property damage on a Neosho Post Office because the trial court never had jurisdiction. The United States has exclusive jurisdiction on federal lands, and a post office is federal land. Mr. Laughlin's original habeas petition – fifteen years ago – raised this issue only at the circuit court level and was denied. But this habeas petition – challenging the circuit court's decision fifteen years ago for lack of jurisdiction – was granted. The recent habeas petition was not procedurally barred because Mr. Laughlin demonstrated a jurisdictional defect.

SIGNIFICANT DECISIONS FROM OTHER STATE COURTS

State v. Sandoval, -- N.W.2d --, No. S-05-142, 2010 WL 2976928 (Neb. July 30, 2010). In this capital direct appeal the Nebraska Supreme Court affirmed yet another death sentence stemming from the Norfolk bank robbery of 2002. Jorge Sandoval had all seventeen of his issues denied by the Nebraska Supreme Court. As a matter of first impression, the court created a new rule regarding anonymous juries – a broad term that encompasses when juror identification information is kept from the public and the parties themselves. Here, the least secretive method was used in that names were the only thing withheld. In order to have an anonymous jury – going forward – the trial court must demonstrate it has both a compelling need to protect the jury and that it has taken precautions to prevent prejudice to the defendant. The court cited *United States v. Mansoori*, 304 F.3d 635 (7th Cir. 2002), to note that anonymous juries risk taking the presumption of innocence away from the defendant. Here, the court found that the defendant's association with the Latin Kings, along with significant media coverage and the potential sentence of death satisfied the need to protect the jury prong. In evaluating the precautions taken to prevent prejudice, the court focused heavily on whether defendant could conduct an effective *voir dire* and what impact the anonymity had on the defendant's presumption of innocence. Here, the jurors were known by number, but their biographical information was shared allowing an extensive *voir dire*. The court gave no instruction regarding the anonymity of the jury as it related to the defendant's presumption of innocence, but it did not draw attention to it, so the Nebraska Supreme Court held the trial court did not compromise Mr. Sandoval's presumption of innocence.

Arkansas Public Defender Com'n v. Pulaski County, --- S.W.3d ---, No. CR 10-120, 2010 WL 1920312 (Ark. May 13, 2010). The Arkansas Supreme Court upheld a ruling by the Pulaski County Circuit Court ordering the Arkansas Public Defender Commission ("APDC") to pay the expenses associated with defending a capital-murder defendant. This defendant had his own retained counsel, but the court upheld the order interpreting the Arkansas statute to make no distinction between appointed and retained counsel when it came to APDC's duty to pay. The defendant retained counsel, but the circuit court still ruled he was indigent under Arkansas' definition. The court relied heavily on *Ake v. Oklahoma*, 470 U.S. 68 (1985) and its progeny, to require funding to mount an adequate defense.

Marcynuik v. State, -- S.W.3d --, No. CR09-634, 2010 WL 2131968 (Ark. May 27, 2010). The Arkansas Supreme Court affirmed Zachariah Marcynuik's conviction and death sentence on direct appeal. The court rejected numerous

claims, including sufficiency of the evidence, admission of autopsy photos, a *Miranda* claim, and various attacks on the aggravating circumstances.

Anderson v. State, No. CR08-1464, 2010 WL 987046 (Ark. Mar. 18, 2010). The Arkansas Supreme Court ordered rebriefing in Justin Anderson's state postconviction appeal. "[T]he argument portion of the brief filed by appellate counsel on Anderson's behalf is woefully deficient . . . ." This appeal stems from Mr. Anderson's second sentencing phase.

State v. Wright, No. 0801010328, 2010 WL 746240 (Del. Super. Ct. Mar. 5, 2010). The trial judge spared Mr. Wright's life and sentenced him to life without parole despite the jury's death recommendation. Delaware leaves sentencing in capital cases up to the presiding trial judge. The trial court remarked that "[t]here is no decision more difficult, nor duty more profound" than the decision on "whether to sentence a human being to death." The judge stated that the jury's 7-5 decision in favor of the death penalty was "not overwhelming," and she sentenced Mr. Wright to life without parole after "independently consider[ing] the evidence." [Note: Here in Missouri, by contrast, no trial judge has ever gone against a jury's death recommendation and imposed life.]

Com. v. Smith, 995 A.2d 1143 (Pa. 2010). The Supreme Court of Pennsylvania granted post-conviction relief in Mr. Smith's capital case. Trial counsel focused "myopically" on the guilt-phase defense – here, a defense of cocaine-induced psychosis. Counsel failed to discover a wealth of mitigating evidence, including childhood abuse and drug use. Additionally, the actual task of mitigation investigation was delegated one month prior to trial.

Waldrop v. State, -- So.3d --, No. CR07-0148, 2010 WL 753312 (Ala. Crim. App. Mar. 5, 2010). The Court of Criminal Appeals of Alabama ordered a new trial in Mr. Waldrop's capital appeal. The trial court failed to give an instruction when the prosecution impeached Mr. Waldrip based on his prior convictions. Under Alabama case law, the court must *sua sponte* instruct the jury that evidence of Mr. Waldrop's prior felony conviction cannot be used to demonstrate his guilt in this case – because it was introduced to impeach. The court said the lack of an instruction was "presumptively prejudicial."

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